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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of) MM DOCKET NO. 93-54
)
GAF BROADCASTING COMPANY, INC.) File No. BRH-910201WL
)
For Renewal of License of Station)
WNCN(FM) (104.3 MHz), New York,)
New York)
)
CLASS ENTERTAINMENT AND)
COMMUNICATIONS, L.P.) File No. BPH-910430ME
)
THE FIDELIO GROUP, INC.) File No. BPH-910502MQ
)
For a Construction Permit for a)
New FM Station on 104.3 MHz at)
New York, New York)

To: The Commission

MASS MEDIA BUREAU'S MOTION TO DISMISS

1. On April 12, 1993, The Fidelio Group, Inc. ("Fidelio") filed a Motion for Deferral of Procedural Dates in the above-captioned proceeding. The Mass Media Bureau hereby urges the Commission to dismiss Fidelio's pleading.

2. Fidelio seeks to have all procedural dates in this comparative renewal proceeding stayed pending resolution of: (a) certain matters which are under consideration by the Bureau's EEO Branch; (b) certain matters which are under consideration by the U.S. Court of Appeals for the District of Columbia Circuit; and (c) certain matters that might be raised by the Listeners' Guild, Inc., in pleadings which have yet to be filed with the

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Commission.

3. As a threshold matter, Fidelio's pleading was directed to the wrong forum. This case is now before Administrative Law Judge Joseph Chachkin, not the Commission. See Hearing Designation Order, DA 93-226 (released March 15, 1993) ("HDO"); and Order, FCC 93M-112 (released March 18, 1993). As a consequence, any request for a deferral or stay of the Presiding Judge's procedural dates should have been filed with the Presiding Judge. See Sections 0.341, 1.243, and 1.291 of the Commission's Rules.

4. Inasmuch as Fidelio suggests that the HDO was prematurely released, its pleading essentially is an application for review of the HDO. Pursuant to Section 1.115(e)(3) of the Commission's Rules, however, applications for review of hearing designation orders will not be entertained until after the Review Board has issued a final decision, unless the Presiding Judge certifies the application for review to the Commission in order to resolve a controlling question of law. Neither of these requisite actions has been satisfied. Thus, to the extent that Fidelio's request for relief is considered an application for review of the HDO, it is an unauthorized pleading subject to

dismissal.¹

5. Even if Fidelio's pleading was properly before the Commission, there clearly is no justifiable basis for delaying this proceeding. If either the EEO Branch or the Court of Appeals takes action warranting the addition of issues against GAF Broadcasting Company, Inc., such issues can be added at the appropriate time upon request properly made to the Presiding Judge. It simply makes no sense to put an entire proceeding on hold indefinitely on the mere possibility that further issues against one of the applicants might be warranted. Furthermore, it would be absurd to stay a case on the basis of matters which might be contained in a pleading which the Listeners' Guild, Inc. has not even filed with the Commission.

6. Fidelio also fails to satisfy the test for a stay, as set forth in Washington Metro Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977), and Virginia Petroleum Jobbers Association v Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958). Fidelio's bizarre predictions of an overly complicated and disorderly case entirely overstate the situation. Indeed, it may very well be that the EEO Branch and

¹ Nor can Fidelio's pleading be considered a properly filed petition for reconsideration of the HDO. See Section 1.106(a)(1) of the Commission's Rules ("petition for reconsideration of an order designating a case for hearing will be entertained if, and insofar as, the petition relates to an adverse ruling with respect to petitioner's participation in the proceeding.").

the Court of Appeals render decisions which do not warrant addition of issues against the incumbent licensee in this proceeding. Additionally, no party will be irreparably injured if this case proceeds in the ordinary course on the issues specified in the HDO. It is impossible to perceive how the public interest would be served by delaying this case merely for

CERTIFICATE OF SERVICE

I, Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certify that I have, on this 16th day of April 1993, sent by First Class mail, U.S. Government frank, copies of the foregoing "Mass Media Bureau's Motion to Dismiss" to:

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